

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

RAYMOND GARCIA,	)	Case No. CV 14-1944-RT(AJW)
	)	
Petitioner,	)	
	)	
v.	)	MEMORANDUM AND ORDER
	)	DISMISSING PETITION
M.D. BITER,	)	WITHOUT PREJUDICE
	)	
Respondent.	)	
	)	

Petitioner filed this petition for writ of habeas corpus on March 6, 2014.<sup>1</sup> On April 1, 2014, the Court issued an order to show cause why the petition should not be dismissed as barred by the one year limitation period. See 28 U.S.C. §2244(d)(1). The order explained that the petition appeared to be untimely because petitioner's conviction became final in January, 1998, and petitioner had one year within which to file a federal petition, but he did not do so until

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<sup>1</sup> Although the petition was filed by the Clerk's Office on March 14, 2014, petitioner is entitled to the benefit of the "mailbox rule," pursuant to which a state or federal habeas petition is deemed filed on the date on which petitioner handed it to the proper prison official for mailing. See Houston v. Lack, 487 U.S. 266, 276 (1988) (holding that a pro se prisoner's pleading is deemed filed at the moment it is delivered to prison authorities for forwarding to the district court).

1 March, 6, 2014 - more than fifteen years after the limitation period  
2 expired. See Patterson v. Stewart, 251 F.3d 1243, 1245-1246 (9th  
3 Cir.), cert. denied, 534 U.S. 978 (2001). In addition, the Court  
4 explained that it did not appear that petitioner had filed any state  
5 petitions during the relevant period, so the limitation period was not  
6 statutorily tolled.<sup>2</sup> Finally, the Court noted that petitioner had not  
7 provided any explanation for his delay suggesting that he might be  
8 entitled to equitable tolling. Petitioner was directed to file a  
9 response to the order setting forth the dates on which he filed any  
10 state petitions and also setting forth any evidence suggesting that he  
11 had been pursuing his rights diligently but some extraordinary  
12 circumstance beyond his control made it impossible for him to file his  
13 petition on time. See Pace v. DiGuglielmo, 544 U.S. 408, 418 & n.8  
14 (2005).

15 Petitioner was cautioned that failure to file a response could  
16 result in the dismissal of his petition. His response was due on  
17 April 29, 2014. As of the date of this report and recommendation,  
18 petitioner has filed neither a response to the order to show cause nor  
19 a request for an extension of time to do so. For the following  
20 reasons, the petition should be dismissed.

21 A district court's authority to dismiss a litigant's action for  
22 failure to prosecute or to comply with court orders is well-

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24 <sup>2</sup> Petitioner indicated that he filed several habeas corpus  
25 petitions in the state courts, but the first such petition was not  
26 filed until August 6, 2013 [Petition at 3-4 & Exs. C-F], more than a  
27 decade after the limitation period expired. See Ferguson v.  
28 Palmateer, 321 F.3d 820, 823 (9th Cir.) ("section 2244(d) does not  
permit the reinitiation of the limitations period that has ended  
before the state petition was filed"), cert. denied, 540 U.S. 924  
(2003).

1 established. See Fed. R. Civ. P. 41(b); Link v. Wabash R. Co., 370  
2 U.S. 626, 629-630 (1962); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th  
3 Cir.), cert. denied, 506 U.S. 915 (1992). "The power to invoke this  
4 sanction is necessary in order to prevent undue delays in the  
5 disposition of pending cases and to avoid congestion in the calendar  
6 of the District Courts." Link, 370 U.S. at 629-630.

7 In determining whether to dismiss a case for failure to  
8 prosecute, failure to comply with court orders, or failure to comply  
9 with a local rule, a district court should consider the following five  
10 factors: "(1) the public's interest in expeditious resolution of  
11 litigation; (2) the court's need to manage its docket; (3) the risk of  
12 prejudice to the defendants; (4) the public policy favoring  
13 disposition of cases on their merits; and (5) the availability of less  
14 drastic sanctions." In re Phenylpropanolamine (PPA) Prod. Liab.  
15 Litig., 460 F.3d 1217, 1226-1228, 1234-1252 (9th Cir. 2006) (discussing  
16 and applying those factors); Pagtalunan v. Galaza, 291 F.3d 639, 642  
17 (9th Cir. 2002) (same), cert. denied, 538 U.S. 909 (2003); see  
18 generally Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1115  
19 (9th Cir. 2004) (failure to comply with discovery orders); Southwest  
20 Marine Inc. v. Danzig, 217 F.3d 1128, 1138 (9th Cir. 2000) (failure to  
21 prosecute), cert. denied, 523 U.S. 1007 (2001). Regardless of whether  
22 a litigant's conduct is most properly characterized as failing to  
23 prosecute, comply with orders, or follow a local rule, the applicable  
24 standard is the same.

25 The first and second factors – the public's interest in  
26 expeditious resolution of litigation and the court's need to manage  
27 its docket – favor dismissal. See Computer Task Group, 364 F.3d at  
28 1115; Pagtalunan, 291 F.3d at 642; Yourish v. California Amplifier,

1 191 F.3d 983, 990 (9th Cir. 1999)); see also In re PPA Prod. Liab.  
2 Litig., 460 F.3d at 1234 ("[D]ismissal serves the public interest in  
3 expeditious resolution of litigation as well as the court's need to  
4 manage the docket when a plaintiff's noncompliance has caused the  
5 action to come to a halt, thereby allowing the plaintiff, rather than  
6 the court, to control the pace of the docket.").

7 The third factor – prejudice to the defendants or respondents –  
8 also weighs in favor of dismissal. In the absence of a showing to the  
9 contrary, prejudice to the defendants or respondents is presumed from  
10 unreasonable delay. In re Eisen, 31 F.3d 1447, 1452-53 (9th Cir.  
11 1994)(citing Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir.  
12 1976)); see also Pagtalunan, 291 F.3d at 642-643 (holding that  
13 unreasonable delay weighed in favor of dismissal, and noting that  
14 "[u]nnecessary delay inherently increases the risk that witnesses'  
15 memories will fade and evidence will become stale") (citing Sibron v.  
16 New York, 392 U.S. 40, 57 (1968)).

17 The fourth factor – the availability of less drastic sanctions –  
18 also supports dismissal. The Court explicitly warned petitioner about  
19 the consequences of failing to file a response to the order to show  
20 cause. See In re PPA Prod. Liab. Litig., 460 F.3d at 1229 ("Warning  
21 that failure to obey a court order will result in dismissal can itself  
22 meet the 'consideration of alternatives' requirement."); Ferdik, 963  
23 F.2d at 1262 ("[A] district court's warning to a party that his  
24 failure to obey the court's order will result in dismissal can satisfy  
25 the 'consideration of alternatives' requirement."); Anderson, 542 F.2d  
26 at 525 ("There is no requirement that every single alternative remedy  
27 be examined by the court before the sanction of dismissal is  
28 appropriate. The reasonable exploration of possible and meaningful

1 alternatives is all that is required.").

2       The fifth factor – the public policy favoring disposition of  
3 cases on their merits – weighs against dismissal, as it always does.  
4 Pagtalunan, 291 F.3d at 643 (citing Hernandez v. City of El Monte, 138  
5 F.3d 393, 399 (9th Cir. 1998)). Despite the policy favoring  
6 disposition on the merits, however, it remains a litigant's  
7 responsibility to comply with orders issued by the court and "to move  
8 towards that disposition at a reasonable pace, and to refrain from  
9 dilatory and evasive tactics." In re Eisen, 31 F.3d 1447, 1454 (9th  
10 Cir. 1994) (quoting Morris v. Morgan Stanley & Co., 942 F.2d 648, 652  
11 (9th Cir. 1991)). Petitioner has not fulfilled that obligation.

12       The five-factor test for dismissal under Rule 41(b) is a  
13 disjunctive balancing test, so not all five factors must support  
14 dismissal. See Valley Eng'rs Inc. v. Elec. Eng'g Co., 158 F.3d 1051,  
15 1057 (9th Cir. 1998) (noting that the five-factor test "amounts to a  
16 way for a district judge to think about what to do, not a series of  
17 conditions precedent" to dismissal), cert. denied, 526 U.S. 1064  
18 (1999); Hernandez, 138 F.3d at 399 (explaining that dismissal is  
19 appropriate when four factors support dismissal or where three factors  
20 "strongly" support dismissal). Four of the five factors support  
21 dismissal in this case.

22       Prior to dismissal on the court's own motion, a pro se petitioner  
23 should be notified of the basis for dismissal and warned that  
24 dismissal is imminent. See Ferdik, 963 F.2d at 1262; West Coast  
25 Theater Corp. v. City of Portland, 897 F.2d 1519, 1523 (9th Cir.  
26 1990). That prerequisite has been satisfied in this case. Therefore,  
27 dismissal under Rule 41(b) is appropriate.

28       It is within the Court's discretion to determine whether

1 dismissal for failure to prosecute and for failure to comply with  
2 orders should be with prejudice or without prejudice. Considering all  
3 the circumstances, dismissal without prejudice is more appropriate in  
4 this case.

5 For the foregoing reasons, this case is dismissed without  
6 prejudice.

7 **It is so ordered.**

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9 Dated: June 4, 2014

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11 ROBERT J. TIMLIN

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Robert Timlin  
United States District Judge  
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